Sivananthan a/l Jaganathan v Teh Yee Fun & Anor

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 11–48 OF 2003
KAMALANATHAN RATNAM J
7 MAY 2003

Civil Procedure *— Amendment — Defence — Application to amend the defence — Whether appeal to amend after the commencement of the hearing allowed and justified — Whether court could rely on the deponent's affidavit in support of the application to amend*

The plaintiff was riding his motorcycle when he collided into a motorcar driven by the first defendant who was the servant or agent of the second defendant who owned the motorcar which was proceeding from the opposite direction. The plaintiff pleaded that the first defendant had swerved suddenly into his path which caused him to avoid the car but was unsuccessful and thus, sustained injuries. The plaintiff's case was that the collision was attributed by the negligence of the first defendant. The defendants denied the collision and attributed the collision solely to the negligence of the plaintiff or that the collision was contributed to by the negligence of the plaintiff and pleaded negligence as against the plaintiff. After the trial had commenced, the defendants' solicitors filed an application to amend the defence. They attributed the injuries caused to the plaintiff as having occured when the plaintiff lost control of his motorcycle and fell on his own. Alternatively, the amendment sought was that if the court found that the said motorcar was involved in the accident then the defendants sought contribution from the plaintiff. The application to amend was supported by an affidavit affirmed by a lawyer who averred that all the facts he deposed to were within his personal knowledge. Counsel for the plaintiff objected to this amendment but the learned magistrate allowed it. By consent, parties stayed further proceedings and brought this appeal.

Held, allowing the appeal:

(1) This appeal from the decision of the learned magistrate was no doubt brought pursuant to O 49 r 6(1) of the Subordinate Court Rules 1980. A ruling made in the course of the hearing of an application must be a ruling on some point other than the ultimate question of whether the application is to be allowed or dismissed. The right to appeal from a particular decision can only be denied by clear words. Whether a decision is a ruling that is excluded by the excluding clause in the definition of 'decision' in s 3 of the Court of Judicature Act 1964 is a question of statutory interpretation of that clause (see p 204B–E); *Sitrac Corp Sdn Bhd v Lim Siew Eng* [2002] 3 MLJ 315 followed.

(2) By affirming a sworn affidavit that he had factual knowledge of the facts leading to the need to amend, the deponent to the supporting affidavit, had indeed descended into the arena of

conflict and had exposed himself to being questioned on his factual knowledge. Since the defendant, whether the first or the second who told the said solicitor that, the first defendant was not involved in the said accident had himself not affirmed an affidavit, it was held that the supporting affidavit filed by Dasaratharaj that he was told that the first defendant was not involved in the accident, was based on hearsay evidence and thus, the affidavit did not support the application (see p 205E–G).

(3) In this case, there was no doubt in concluding that the learned magistrate who allowed the application to amend, was plainly wrong. The exercise of the power to grant or refuse amendment of pleadings at any stage of the proceedings is in the discretion of the judge, but the power must always be exercised judicially having regard to the prevailing practice and whether the amendment sought by one party, if allowed, would cause injustice or prejudice to the other party which cannot be compensated by costs, bearing in mind that it is not always easy to measure justice in terms of money. Each application must therefore be decided on its own merit (see pp 206H, 207B–D); *Bacom Enterprises Sdn Bhd v Jong Chuk & Ors* [1998] 2 MLJ 301 followed.

(4) Counsel who affirmed the affidavit in support averred that he relied on certain documents in addition to his personal knowledge. The defendants had not annexed a single document as an exhibit to the affidavit in support, affirmed by their counsel. There was therefore absolutely no basis on which the High Court could rely on the deponent's affidavit in support of the application to amend. Thus, there was non-disclosure of documents in the affidavit (see p 207D–E); *Insas Bhd & Anor v Raphael Pura* [1999] 4 MLJ 650 followed.

[Bahasa Malaysia summary

Plaintif telah membawa motorsikal apabila beliau berlanggar dengan sebuah kereta yang dipandu oleh defendan pertama yang merupakan pekerja atau ejen defendan kedua yang memiliki kereta tersebut yang datang dari arah yang bertentangan. Plaintif telah memplidkan bahawa defendan pertama telah membelok dengan tiba-tiba ke arah beliau yang menyebabkan beliau cuba mengelak kereta tersebut tetapi gagal dan oleh itu, telah mengalami kecederaan. Kes plaintif adalah bahawa perlanggaran tersebut telah diakibatkan oleh kecuaian defendan pertama. Defendan-defendan telah menafikan perlanggaran tersebut dan menyatakan perlanggaran tersebut adalah kecuaian plaintif semata-matanya atau bahawa perlanggaran tersebut menyumbang kepada kecuaian plaintif dan memplidkan kecuaian terhadap plaintif. Setelah perbicaraan dimulakan, peguamcara defendan-defendan telah memfailkan satu permohonan untuk meminda pembelaan tersebut. Mereka menyatakan kecederaan yang dialami oleh plaintif terjadi apabila plaintif hilang kawalan

motorsikalnya dan jatuh dengan sendiri. Secara alternatifnya, pindaan yang dipohon adalah jika mahkamah mendapati kereta tersebut terlibat dalam kemalangan tersebut maka defendan-defendan akan memohon wujudnya sumbangan dari plaintif. Permohonan untuk membuat pindaan telah disokong oleh satu afidavit yang disahkan oleh seorang peguam yang telah menegaskan bahawa semua fakta-fakta yang telah dideposkan oleh beliau berada dalam pengetahuan peribadinya. Peguam bagi pihak plaintif telah membantah terhadap pindaan ini tetapi majistret yang bijaksana telah membenarkannya. Dengan persetujuan, pihak-pihak telah menggantung prosiding seterusnya dan memulakan rayuan ini.

Diputuskan, membenarkan rayuan tersebut:

(1) Rayuan ini berdasarkan keputusan majistret yang bijaksana tanpa diragui telah dimulakan menurut A 49 k 6(1) Kaedah-Kaedah Mahkamah Rendah 1980. Satu perintah yang dibuat semasa perbicaraan satu permohonan hendaklah merupakan satu perintah berdasarkan suatu perkara selain daripada persoalan yang utama sama ada permohonan tersebut akan dibenarkan atau ditolak. Hak untuk merayu dari satu keputusan tertentu hanya boleh ditolak dengan perkataan yang jelas. Sama ada satu keputusan adalah satu perintah yang dikecualikan oleh fasal pengecualian dalam tafsiran 'decision' dalam s 3 Akta Mahkamah Kehakiman 1964 adalah satu persoalan tafsiran statutori fasal tersebut (lihat ms 204B–E); *Sitrac Corp Sdn Bhd v Lim Siew Eng* [2002] 3 MLJ 315 followed.

(2) Dengan mengesahkan afidavit yang disumpah bahawa beliau mempunyai pengetahuan fakta tentang fakta-fakta yang memerlukan pindaan dibuat, deponen kepada afidavit sokongan, sememangnya telah terjebak dalam kancah percanggahan dan telah mendedahkan dirinya untuk disoal berhubung pengetahuan fakta beliau. Memandangkan defendan, sama ada yang pertama atau kedua yang telah memberitahu peguamcara tersebut bahawa, defendan pertama tidak terlibat dalam kemalangan tersebut dengan sendirinya tidak mengesahkan satu afidavit, ia diputuskan bahawa afidavit sokongan yang difailkan oleh Dasaratharaj bahawa beliau telah diberitahu yang defendan pertama tidak terlibat dalam kemalangan tersebut, adalah berdasarkan keterangan dengar cakap dan oleh itu, afidavit tersebut tidak menyokong permohonan tersebut (lihat ms 205E–G).

(3) Dalam kes ini, tidak dapat diragukan dalam memutuskan bahawa majistret yang bijaksana yang telah membenarkan permohonan untuk meminda tersebut, telah terkhilaf. Penggunaan kuasa untuk membenarkan atau menolak pindaan kepada pliding-pliding pada mana-mana peringkat prosiding adalah dalam budi bicara hakim, tetapi kuasa tersebut hendaklah sentiasa digunakan

secara adil dengan menimbangkan amalan semasa dan sama ada pindaan yang dipohon oleh suatu pihak, jika dibenarkan, akan menyebabkan ketidakadilan atau prejudis kepada pihak yang satu lagi yang tidak boleh diberi pampasan dengan kos, dengan mengambilkira bahawa ia bukan sentiasa mudah untuk menilai keadilan dalam bentuk wang. Setiap permohonan oleh itu hendaklah diputuskan atas meritnya (lihat ms 206H, 207B–D); *Bacom Enterprises Sdn Bhd v Jong Chuk & Ors* [1998] 2 MLJ 301 diikut.

(4) Peguam yang mengesahkan afidavit sokongan tersebut menegaskan bahawa beliau bergantung kepada dokumen-dokumen tertentu selain pengetahuan peribadinya. Defendan-defendan tidak melampirkan satupun dokumen sebagai satu ekshibit kepada afidavit sokongan, yang disahkan oleh peguam mereka. Oleh demikian tiada asas langsung untuk Mahkamah Tinggi bergantung kepada afidavit sokongan kepada permohonan untuk meminda deponen. Dengan itu, terdapat ketidakdedahan dokumen dalam afidavit tersebut (lihat ms 207D–E); *Insas Bhd & Anor v Raphael Pura* [1999] 4 MLJ 650 diikut.]

Notes

For cases on amendments to the defence, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 437–452.

Cases referred to

Ashmore v Corp of Lloyd's [1992] 2 All ER 486 (refd)
Bacom Enterprises Sdn Bhd v Jong Chuk & Ors [1998] 2 MLJ 301 (folld)
Bhimnath v Jagarnath [1925] Patna 674 (refd)
Chong Poh Siev v Chong Poh Heng [1995] 1 SLR 135 (refd)
Insas Bhd & Anor v Raphael Pura [1999] 4 MLJ 650 (folld)
Jamil bin Harun v Yang Kamsiah & Anor [1984] 1 MLJ 217 (refd)
Malayan Banking Bhd v Charterefield Corp Sdn Bhd [2001] 3 MLJ 160 (refd)
Sitrac Corp Sdn Bhd v Lim Siew Eng [2002] 3 MLJ 315 (folld)
Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd [1999] 2 MLJ 696 (refd)

Legislation referred to

Court of Judicature Act 1964 s 3
Subordinate Court Rules 1980 O 49 r 6(1)

Baljit Singh (*Raman Veloo* with him) (*Baljit Singh & Co*) for the appellant/plaintiff.

VK Dasaratharaj (*VP Nathan & Partners*) for the respondent/defendant.

Kamalanathan Ratnam J:

Facts

This short but interesting point of law arises out of a running down action. In his statement of claim, the plaintiff pleaded that on 15 November 2000 whilst he was riding his motorcycle at about 8.40 in the morning along Jalan Tanjung Tokong from the direction of Tanjung Tokong towards his place of work in the city, he was involved in an accident with a motorcar driven by the first defendant as the servant or agent of the second defendant who owned the said motorcar and which said motorcar was proceeding from the opposite direction. The plaintiff further pleaded that suddenly and without warning, the first defendant swerved to the right and across the plaintiff's path. The plaintiff attempted to swerve and to brake but was unsuccessful, and thus, collided into the said car and sustained injuries. The plaintiff set out 18 particulars of negligence attributed to the first defendant.

In their defence, the defendants admitted paras 2 and 3 of the statement of claim which averred that at all material times the first defendant was the driver and the second defendant the registered owner of the said motorcar respectively.

By para 3 of the defence, the defendants admitted that at about the time, date and place referred to in para 4 of the statement of claim, a collision occurred between the motorcycle ridden by the plaintiff and the motorcar driven by the first defendant. However, the defendants denied that the collision had occurred as pleaded by the plaintiff. The defendants attributed the collision solely to the negligence of the plaintiff or that the collision was contributed to by the negligence of the plaintiff. The defendants then went on to plead 21 particulars of negligence as against the plaintiff. The defendants prayed for the action to be dismissed with costs. This defence was filed on 4 September 2001.

The application to amend the defence

On 7 March 2003, after the trial had commenced, the defendants' solicitors filed an application to amend the defence. The proposed amended defence was annexed to the affidavit in support of the application to amend. By the said amendment, the defendants denied the said collision. They attributed the injuries caused to the plaintiff as having occurred when the plaintiff lost control of his motorcycle and fell on his own. Alternatively, the amendment sought was that if the court found that the said motorcar was involved in the accident then the defendants sought contribution from the plaintiff and again relied on the same 21 particulars of negligence earlier pleaded against the plaintiff .

The application to amend was supported by an affidavit affirmed by one Dasaratharaj who described himself as an advocate and solicitor having the conduct of the case. He also averred that all the facts he had deposed to were within his personal knowledge and also acquired from documents within his possession He also averred in para 3 of the said affidavit that he

had been informed by the defendant (and I presume from the first defendant) that he, the defendant was not involved in the said accident. A

Mr Baljit Singh for the plaintiff objected to this amendment. However, the learned magistrate allowed the amendment. By consent, parties stayed further proceedings and brought this appeal.

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Findings of the court

This appeal from the decision of the learned magistrate is no doubt brought pursuant to O 49 r 6(1) of the Subordinate Court Rules 1980 which reads as follows:

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> Appeal to Judge in Chambers (O 49 r 6)
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> (1) Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial.

In *Sitrac Corp Sdn Bhd v Lim Siew Eng* [2002] 3 MLJ 315, Abdul Aziz J (as he then was) held that a ruling made in the course of the hearing of an application must be a ruling on some point other than the ultimate question of whether the application is to be allowed or dismissed. The right to appeal from a particular decision can only be denied by clear words. Whether a decision is a ruling that is excluded by the excluding clause in the definition of 'decision' in s 3 of the Court of Judicature Act 1964 is a question of statutory interpretation of that clause. It is an incorrect approach to the interpretation of that clause to begin by asking the question whether the decision is a final order or an interlocutory order because the term 'final order' or 'interlocutory order' is not used in the excluding clause. D E

I agree and adopt the view held in *Sitrac Corp Sdn Bhd.* In fact, this view was long ago accepted by the Court of Appeal in *Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd* [1999] 2 MLJ 696. F

Referring to para 18/7/8 of the *Supreme Court Practice* (Malaysian Ed 1996), Mr Dasaratharaj argued that either party may in a proper case include in his pleading two or more inconsistent sets of material facts and claim relief there under in the alternative. G

Whilst this may be so, I prefer to accept the view of Mullick J in *Bhimnath v Jagarnath* [1925] Patna 674 where his Lordship said at p 675 as follows:

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> Although the Judicature Act in England has widened the rules of pleading and now enables parties to claim relief in the alternative upon setting out inconsistent facts, the trend of judicial decisions in India seems to limit the scope of the Code and to forbid a plaintiff, certainly where the facts are presumably within his knowledge to plead inconsistent facts and to require him to elect, so that the defendant may know what cause he has to meet; and similarly a defendant may not plead inconsistent facts unless he is a stranger to the transaction and the true state of facts is not within his personal knowledge. I

A *Personal knowledge*

We now come to the question of 'personal knowledge' of the facts. The deponent to the supporting affidavit is the lawyer having conduct of this case. He had averred that he had personal knowledge of the facts leading to the need to amend. Unless he was travelling in the car with the first B defendant or was a passer by and thus witnessed the accident, he could not be said to have personal knowledge, Therefore, his averment that he had personal knowledge is not correct. In fact in para 3 of the said affidavit, he had averred that he had been informed by the defendant but he did not state if it was the first defendant who had informed him that he, the first defendant was not involved in the accident. The question that needs to be C asked is, if the solicitor was actually informed by the first defendant, then why did he not require the first defendant to file the supporting affidavit.

To my mind, a solicitor who affirms an affidavit involving facts is over-stepping the bounds and limits of his office. In this particular case, if the plaintiff had filed an application to cross-examine Dasaratharaj on his D affidavit, counsel would have unnecessarily put himself in difficult situations. Firstly, the basic bulwark of solicitor/client relationship that protects — communication between solicitors and clients itself would become an issue. If an advocate affirms factual affidavits, he would be descending into the arena of conflict by being partisan towards the party on whose behalf he is affirming the affidavit. And in that case, the other side is E clearly entitled to cross-examine him to show his partisanship. He would then have to disqualify himself from having further conduct of the case.

It is my judgment that by affirming a sworn affidavit that he had factual knowledge of the facts leading to the need to amend, the deponent to the supporting affidavit, had indeed descended into the arena of conflict and F had exposed himself to being questioned on his factual knowledge.

But that is not the end of the matter. Since the defendant, whether the first or the second who told the said solicitor that, the first defendant was not involved in the said accident had himself not affirmed an affidavit, I hold that the supporting affidavit filed by Dasaratharaj that he was told that the first defendant was not involved in the accident, is based on hearsay G evidence and thus, the affidavit does not support the application.

Coming to the case of *Bhimnath*, whilst I am not prepared to hold the view that once a defendant had denied the collision, he is not entitled to plead in the alternative that if the court finds his involvement, then the court ought to see if there was contribution based on the conduct of the plaintiff H throughout the moments leading to the accident, yet in this particular case, where the same counsel who has had the conduct of the case had averred that he was told by the first defendant that he was not at all involved in the accident then and in such an event by raising an alternative plea, counsel is deemed to have exceeded his instructions since the affidavit did not disclose that the first defendant had authorized him to plead in the alternative, in the I event the court found his involvement true. That is why I had emphasized earlier that it would have been prudent to have the first or second defendant to affirm an affidavit to that effect.

Solicitors must realize that theirs is an onerous job filled with enticements and entrapments. Lawyers must know that whilst on the one hand there will be the desire to protect and preserve the continuing relationship of a long standing solicitor/client commitment, yet on the other hand such a relationship can cloud the solicitors true perception of the case by a refusal to see the rays of truth that had been pervading the case.

I must add that a litigant who avails himself of the right to press inconsistent views before the court and endeavours to establish both the alternatives by relying on hearsay evidence of his solicitor, or by refusing himself to affirm an affidavit to the truth of the matters stated by his solicitor, is plainly in my view placing himself in peril and might find himself entangled in inextricable difficulty because evidence adduced in two absolutely inconsistent situations which are mutually destructive, can hardly be expected to secure confidence.

At this point, it is pertinent to refer to the view of Lord Templeman in *Ashmore v Corp of Lloyd's* [1992] 2 All ER 486 at p 493 (a judge worthy of the greatest respect before whom I had the opportunity of arguing the case of *Jamil bin Harun v Yang Kamsiah & Anor* [1984] 1 MLJ 217 (PC)). This is what his Lordship said:

> The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases, the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination. In *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1990] 2 All ER 947 at 959, [1991] 2 AC 249 at pp 280–281, I warned against proceedings in which all or some of the litigants indulge in over-elaboration causing difficulties to judges at all levels in the achievement of a just result. I also said that the appellate court should be reluctant to entertain complaints about a judge who controls the conduct of proceeding and limits the time and scope of evidence and argument. So too, where a judge, for reasons which are not plainly wrong, makes an interlocutory decision or makes a decision in the course of a trial the decision should be respected by the parties and if not respected should be upheld by an appellate court unless the judge was plainly wrong.

In this case, I have no doubt in concluding that the learned magistrate who allowed the application to amend, was plainly wrong.

In *Chong Poh Siev v Chong Poh Heng* [1995] 1 SLR 135, Rubin J in considering a similar issue said at p 151 as follows:

> It should be presently observed that the substance of this alternative plea is contrary to the original claim of the plaintiff that he, is not only the legal owner but also the beneficial owner of the disputed — share. Given the conflicting nature of the interests, I am of the opinion that this alternative

A plea is simply not available to the plaintiff. It is settled law that a plaintiff may rely on several different rights alternatively though they may be inconsistent (per Bret LJ in *Philipps v Philipps & Ors* (1878–79) 4 QBD 127 at p 134). However, as stated by Devlin J in *Heskell v Continental Express Ltd & Anor* [1950] 1 All ER 1033 at p 1044: [a] man cannot in one breath invoke both the truth and an estoppel; he must make his choice. He cannot, in presenting a case against a defendant mix fact and fiction in the proportions which suit him best.

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It is also pertinent to refer to the views of our Court of Appeal on the right to allow to amend. In *Bacom Enterprises Sdn Bhd v Jong Chuk & Ors* [1998] 2 MLJ 301, the Court of Appeal held that the exercise of the power to grant or refuse amendment of pleadings at any stage of the proceedings is in the discretion of the judge, but the power must always be exercised judicially having regard to the prevailing practice and whether the amendment sought by one party, if allowed, would cause injustice or prejudice to the other party which cannot be compensated by costs, bearing in mind that it is not always easy to measure justice in terms of money. Each application must therefore be decided on its own merit.

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There is now another issue that I must consider. Counsel who affirmed the affidavit in support averred that he relied on certain documents in addition to his personal knowledge. Since I have already dealt in depth with the question of personal knowledge, it is now necessary for me to consider what documents if any the defendants are relying on. To my amazement, I realized that the defendants had not annexed a single document as an exhibit to the affidavit in support, affirmed by their counsel. There is therefore absolutely no basis on which this court could rely on the deponent's affidavit in support of the application to amend. In respect of non-disclosure of documents referred to in an affidavit, this is what I had said in *Insas Bhd & Anor v Raphael Pura* [1999] 4 MLJ 650 at p 667:

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> Assuming this is true, ie that some documents were kept overseas, what were they. This court must be shown the documents and they must be identified to satisfy the court that the contention of the defendant that it is unsafe to keep these documents in this country is true. No such affidavit evidence has been led. Mr Raphael Pura's allegation that it is not safe to keep documents in this country is a very serious accusation that must be met with the clearest evidence from him. Otherwise, it could lead to a suggestion of mala fide on the part of the defendant.

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In this context, I accept and adopt the views of Ramli Ali JC (as he then was) in *Malayan Banking Bhd v Charterefield Corp Sdn Bhd* [2001] 3 MLJ 160 wherein he held that a solicitor may depose an affidavit on behalf of the litigant if the following conditions are fulfilled: (i) the facts to be deposed must not be contentious or disputed question of facts; (ii) the facts to be deposed must be from his knowledge; and (iii) he is authorized by the litigant to depose the affidavit.

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I Having considered the submissions and all authorities submitted by both parties, I allowed the appeal and by consent of both parties made no order as to costs since it had been agreed by both parties that this issue be

decided by this court without an order as to costs. I also ordered that the same magistrate do continue to hear the case. A

Appeal allowed.

Reported by Ezatul Zuria Azhari

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